IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
May 19, 2009 Session

STATE OF TENNESSEE v. ELIZABETH MARTIN PATRICK SCALF

Appeal from the Criminal Court for Washington County
No. 32259 Robert E. Cupp, Judge

No. E2008-01150-CCA-R3-CD - Filed July 9, 2009

The defendant, Elizabeth Martin Patrick Scalf, pleaded guilty in the Washington County Criminal Court to one count of vehicular homicide, one count of reckless endangerment, and one count of driving on a revoked license in exchange for an agreed effective sentence of eight years with the method of service to be determined by the trial court. The trial court denied alternative sentencing and ordered the defendant to serve her eight-year sentence in the Department of Correction. The defendant appeals from the trial court's denial of alternative sentencing. We affirm the judgments of the trial court.

Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which NORMA MCGEE OGLE and D. KELLY THOMAS, JR., JJ., joined.

Gene Scott, Jr., Johnson City, Tennessee, for the appellant, Elizabeth Martin Patrick Scalf.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant District Attorney General; Joe Crumley, District Attorney General; and Erin McArdle and Michael Rasnake, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

This case arises from a December 21, 2005 automobile accident that resulted in the death of Larry Haynes. The evidence adduced at the guilty plea hearing and sentencing hearing established that on December 21, 2005, the defendant drove her 16-year-old brother to meet Mr. Haynes in the parking lot of Bailey's Sports Grille. The defendant had borrowed her grandparents' 2002 Chevrolet Trailblazer. Her driver's license had been revoked. Upon meeting Mr. Haynes, the defendant drove to Pat's Mountaineer store, where Mr. Haynes provided the defendant money to purchase a six-pack of beer. The defendant then drove to Leisure Lanes bowling alley in Jonesborough. The defendant testified that she drank from one bottle of beer and that Mr. Haynes consumed the remaining five beers. At the bowling alley, Mr. Haynes, the defendant, and the

defendant's brother played pool and then went to the bowling alley's bar for food and beer. The defendant recalled staying at the bowling alley for approximately two and a half hours.

On the car ride back to Bailey's, Mr. Haynes requested the defendant stop at the One Stop liquor store, where he bought a bottle of tequila. While she drove, the defendant drank from the bottle of tequila, as did Mr. Haynes. Upon Mr. Haynes's request, the defendant quickly stopped at the home of a friend of Mr. Haynes. The defendant traveled on a curvy, dangerous back road to avoid traffic lights and detection by the police. At approximately 10:33 p.m., the defendant drove the Trailblazer into a utility pole located at the end of a guard rail, overturning the vehicle. As a result, Mr. Haynes was ejected from the vehicle and instantaneously died. The defendant suffered serious back injuries. The defendant's brother, who was the only passenger wearing a safety belt, avoided serious injury.

The accident investigation report cited speeding and alcohol use as contributing factors to the accident. A toxicology report established that the defendant's blood alcohol content was .12 percent more than two hours after the wreck.

On January 8, 2007, the defendant pleaded guilty to the vehicular homicide of Mr. Haynes, a Class B felony, *see* T.C.A. § 39-13-213 (2003), the reckless endangerment of her brother, a Class E felony, *see id.* § 39-13-103, and driving on a revoked license, a Class B misdemeanor, *see id.* § 55-50-504. Pursuant to her plea agreement, the defendant agreed to serve an eight-year sentence for the vehicular homicide conviction concurrently with a one-year sentence for her reckless endangerment conviction and a six-month sentence for her driving on a revoked licence conviction. The trial court ordered that the defendant serve her effective eight-year sentence as a Range I, standard offender incarcerated in the Tennessee Department of Correction ("TDOC").

After a May 21, 2008 sentencing hearing, the trial court noted that, although the defendant's criminal history reflected no serious offenses, it showed an extensive history of speeding. The court further noted the significance of these offenses in light of the defendant's being only 23 years old at the time of offense. It stated, "[The defendant] doesn't learn from speeding. It kills and it did that night." The trial court noted that the defendant's history showed a likelihood that she would comply with alternative sentencing and that nothing in the record showed past difficulty with complying with community-based sentencing. The court stated that confinement would not provide an effective deterrent from future vehicular homicides.

The trial court determined, however, that confinement was important in deterring the defendant from causing future wrecks in light of her extensive history of speeding. The court explained the defendant's repeated criminal conduct "from taking speeding ticket after speeding ticket after speeding ticket and then taking another speeding and mixing it with alcohol and killing an individual." The trial court further determined that a sentence other than incarceration would depreciate the seriousness of the defendant's offense. It stated, "Injury or death in a situation that is likely or foreseeable where a defendant was driving fast and carelessly on a hilly, curvy road and consciously disregarded the risk of driving in such a manner, is a factor I can consider." The trial court considered the offense serious even without taking into account the defendant's intoxication. The court considered the offense "horrifying" and "shocking." It determined that "the only

alternative this court has in this case is to order this sentence served." The court entered judgments of conviction reflecting the defendant's sentences on May 21, 2008.

The defendant filed a timely notice of appeal on May 30, 2008. The defendant's sole issue is whether the trial court erred by denying alternative sentencing.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the trial court's determinations are correct. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *Id.* "The burden of showing that the sentence is improper is upon the appellant." *Id.* In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. *Id.* If appellate review reflects that the trial court properly considered all relevant factors and if its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The defendant enjoys no favorable status for alternative sentencing for her Class B felony conviction of vehicular homicide. T.C.A. § 40-35-102(6) (2006). As the recipient of a sentence of ten years or less, the defendant is eligible for probation. *See* T.C.A. § 40-35-303(a). The defendant bore the burden of showing that she was entitled to probation. *See, e.g.*, *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999) (holding that defendant bears the burden of establishing her "suitability for full probation"). In determining sentences involving confinement, the trial court should consider whether "[c]onfinement is necessary to protect society by restraining a defendant with a long history of criminal conduct," whether "[c]onfinement is necessary to avoid depreciating the seriousness of the offense," whether incarceration provides "an effective deterrence to others likely to commit similar offenses," and whether "[m]easures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant." T.C.A. § 40-35-103(1)(A)-(C).

To determine the appropriate combination of sentencing alternatives that shall be imposed on the defendant, the court shall consider the following:

> (1) The evidence, if any, received at the trial and the sentencing hearing;
> (2) The presentence report;
> (3) The principles of sentencing and arguments as to sentencing alternatives;
> (4) The nature and characteristics of the criminal conduct involved;
> (5) Evidence and information offered by the parties on the mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114;
> (6) Any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; and

(7) Any statement the defendant wishes to make in the defendant's own behalf about sentencing.

T.C.A. § 40-35-210(b). Additionally, "[t]he potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative." *Id.* § 40-35-103(5).

The defendant claims that the trial court rested its determination to order full confinement solely upon Tennessee Code Annotated section 40-35-103(1)(B), that the need to avoid depreciating the seriousness of the offense justifies confinement. Citing *State v. Grissom*, 956 S.W.2d 514, 520 (Tenn. Crim. App. 1997), she argues that when the seriousness of the offense forms the basis for denying alternative sentencing, "the circumstances of the offense as committed must be especially violent, horrifying, shocking, reprehensible, offensive or otherwise of an excessive or exaggerated degree, and the nature of the offense must outweigh all factors favoring a sentence other than confinement." The defendant maintains that the nature of the immediate offense is not "horrifying" or "shocking" and that the court erred in relying on this factor in ordering incarceration.

After review of the record, we cannot agree with the trial court that the nature of the defendant's offense is either "horrifying" or "shocking." The offense of vehicular homicide is "the reckless killing of another by the operation of an automobile . . . as the proximate result of . . . [t]he driver's intoxication." T.C.A. § 39-13-213(a)(2). The legislature provided that a vehicular homicide sentence could be suspended, *see id.* § 39-13-102(5)-(6), and so the fact that a death resulted does not per se disqualify the defendant from a suspended sentence. *See State v. Butler*, 880 S.W.2d 395, 400-01 (Tenn. Crim. App. 1994). When the circumstances of the offense serve as the sole basis for denying alternative sentencing, those circumstances must be "especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree." *State v. Hartley*, 818 S.W.2d 370, 374 (Tenn. Crim. App. 1991). The circumstances of the current offense do not show that this is an especially egregious instance of an already egregious offense, vehicular homicide. Mr. Haynes, the victim, contributed to the defendant's intoxication and voluntarily rode in the defendant's vehicle. The evidence adduced in the hearings suggests that the victim himself instructed the defendant to make an additional stop at a friend's house and collaborated with the defendant in taking back roads to avoid police detection. In light of the trial court's misapplication of Code section 40-35-103(1)(B) in ordering confinement, we will review the defendant's sentence under a purely de novo review. *See Ashby*, 823 S.W.2d at 169.

Upon our de novo review, however, we find that a sentence of incarceration is warranted as necessary to protect society by restraining a defendant with a long history of criminal conduct. *See* T.C.A. § 40-35-103(1)(A). First, we note that in our statutory scheme, the defendant, as the recipient of a Class B felony conviction, is not a favorable candidate for alternative sentencing. *See id.* § 40-35-102(6). The defendant's criminal record, although devoid of any serious criminal violations, shows a pattern of fast and reckless driving. Her record shows five speeding violations of 24, 35, 10, 21, and 29 miles per hour in excess of the speed limit, respectively. The evidence showed that speeding contributed to the present offense as well. The defendant self-reported two additional speeding violations to the court. Despite repeated convictions, the defendant continued to drive recklessly, even after her license was revoked. Under these circumstances, we

consider confinement necessary to protect other drivers and passengers from her reckless criminal conduct. *See id.* § 40-35-103(1)(A). Clearly, revoking the defendant's drivers license did not adequately deter her from continuing her dangerous driving. She continued this pattern on December 21, 2005, while she was intoxicated, resulting in her present conviction.

Accordingly, we affirm the defendant's sentence on alternative grounds. We find no error in the judgments of the trial court.

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JAMES CURWOOD WITT, JR., JUDGE